AJMER SINGH

v.

PUBLIC PROSECUTOR

HIGH COURT, SINGAPORE
CHAN SEK KEONG JC
[M.A. NO. 429 OF 1985]
7 NOVEMBER 1986

CRIMINAL LAW AND PROCEDURE: *Offence under s. 69(1) of the Road Traffic Act - Riding whilst under influence of drink - Blood specimen showed presence of alcohol - Whether prosecution had sufficiently proved case to warrant punishment.*

The appellant was charged in the Magistrate's Court for riding a scooter AZ7747 J under the influence of drink, to such an extent as to be incapable of having proper control of such vehicle - an offence under s. 69(1) of the Road Traffic Act ("the Act"). He was convicted and fined $800 and disqualified from holding or obtaining a class 2 driving licence for a period of 2 years. He appealed to the High Court.

Held:

[1] The prosecution has proved its case without resorting to the presumption in s. 71 of the Act.

[2] Counsel's argument that the Magistrate placed too much reliance on PW1's statement that the unsteady gait of the appellant 12 hours after accident was due to the after effect of alcohol (when there could have been no alcohol in the appellant's blood) and not to hypertension or the injury to his head was not accepted. There was sufficient objective evidence to sustain the conviction of the appellant.

[3] The submission that the blood examined by the chemist was not the blood taken by PW1 from the appellant was rejected on the strength of *R. v. Orrell & Tremlett v. Fawcett*.

[Appeal dismissed.]

Cases referred to:
R. v. Bove [1970] RTR 261
R. v. Kuruma [1955] AC 197
R. v. Payne [1963] 1 WLR 637
Scott v. Baker [1969] 1 QB 659
Spicer v. Holt [1976] RTR 389
R. v. Trump [1980] RTR 274
R. v. Sang [1979] 3 WLR 263
Cheng Swee Tiang v. PP [1964] 30 MLJ 29
R. v. Sadler/R.v. Palfrey [1970] RTR 127
Pakala Narayanasamy [1939] 66 IA 66
R. v. Orrell
Tremlett v. Fawcett [1984] 1 RTLR 68

Legislation referred to:
Road Traffic Act 1972 [UK], ss. 5(1), (5), 7(1), 8(2), (4), 9(7),
Road Traffic Act [Sing], ss.68,69(1),70,71.
Road Safety Act 1967 [UK], ss. 2, 3(1), (3)

Other sources referred to:
Forensic Medicine For Lawyers, J.K. Manson, pp. 308, 309

For the appellant - Kalpanath Singh
For the public prosecutor - Ismail Hamid

JUDGMENT

Chan Sek Keong JC:

The appellant was charged with riding a scooter along a road whilst under the influence of drink to such an extent as to be incapable of having proper control of such vehicle, an offence under s. 69(1) of the Road Traffic Act (Reprint) ("the RTA"). He claimed trial and was convicted on 31 October 1985 and sentenced to a fine of $800 and disqualified from holding or obtaining a class 2 driving licence for a period of 2 years.

The facts adduced by the prosecution were as follows: on 7 December 1983, at about 8.20 pm, the appellant was riding motor scooter AZ7747 J along Telok Blangah Way at about 50 kmph when, according to him, he suddenly felt giddy. He applied the brake but the scooter went out of control and he fell off. He remembered being carried to the side of the road. The police arrived at the scene at about 8.28 pm and established that the scooter had skidded and that the appellant had a head injury. The appellant was not arrested but was taken to the Singapore General Hospital where he was examined about two hours later by Dr. Koh Cheng Huat (PW1) who also, at about 10.45 pm took a specimen of the appellant's blood for alcohol analysis. The specimen was analysed by Dr. Danny Lo Siaw Teck, the Senior Scientific Officer.

At the trial the report of PW1 dated 26 January 1984 (P5) and the report of Dr. Danny Lo (P6) were admitted in evidence. P5 states as follows:

> On admission, he was conscious, vital signs stable. Periorbital haematoma of both eyes with 2 cm lacerations over the right eyelid. There was no neurological deficit. He was found also to be hypertensive.
>
> Skull X-ray - no abnormalities detected.
>
> ECG - no abnormalities detected.
>
> Chest X-ray - no abnormalities detected.
>
> Blood alcohol level = 152 mg ethanol per 100 ml of blood.

P6 states as follows:

> I, Dr. Danny Lo Siaw Teck Senior Scientific Officer, Singapore do hereby certify that at 9.40 am on the 8th day of December 1983 there was handed to me by S. Ganesan, one sample blood seal General Hospital Singapore and marked Ajmer Singh, Ad. No. 2038228G.
>
> On analysis, I found the blood sample to contain 152 mg ethanol per 100 ml blood.

PW1 gave evidence and said that when he examined the appellant, had strong alcohol in his breath and that at 8 am the next morning (i.e. about 12 hours after the accident), he had observed the appellant's gait was unsteady. PW1 when cross-examined, admitted that he did not know the diffusion rate but he agreed that on the basis of the statement at p. 308 of JK. Mason's *Forensic Medicine For Lawyers* (that the diffusion rate of ethanol is 15 mg per 100 ml of blood per hour) the alcohol content in the appellant's blood could have been zero at the time he observed the appellant's gait. PW1 nevertheless asserted that he was positive

that the appellant's unsteady gait was due to the after effect of alcohol and not hypertension or the injury to the appellant's head. PW1A was not asked or cross-examined as to whether the appellant's blood was taken with consent.

On the basis of his evidence, the Magistrate called for the defence. The appellant's story was that whilst in his nephew's house, he and his nephew had drunk 4 bottles of beer, that he suffered from hypertension, that he fell from his scooter not because of drink but because a motor car overtook him and stopped in front of him; he had to apply his scooter brakes suddenly and fell off his scooter. He also said that when the car overtook him, he had a slight giddiness and that when he applied the brakes he felt giddy. He thought that his giddiness was due to his blood pressure. He also admitted that whenever he consumed alcohol, he felt a slight intoxication. Under cross-examination, he said that he is not a good drinker and would get intoxicated by small amounts of drinks.

At the end of the case for the defence, the Magistrate convicted the appellant. He held that the appellant's fall was due to his high state of intoxication which made him unable to control his scooter. The Magistrate also held as a matter of law that s. 70 of the RTA did not prohibit the admissibility of the alcohol content of the appellant's blood as evidence as it was taken without complusion, that the presumption under s. 71 of the RTA applied, but that even if it did not, the evidence of PW1 was sufficient to prove the prosecution's case.

The appellant now appeals against his conviction and sentence. In the light of the appellant's own evidence, his Counsel has no hope of persuading this Court that the appellant has been wrongly convicted. However, the appellant's case is that at the end of the prosecution case, he had no case to answer as there was no evidence which was legally admissible to prove the alcohol content of his blood. Counsel contended that the appellant's blood was taken:

(a) when he was not arrested under s. 68 when he was taken to or under arrest whilst in hospital;

(b) without his having been required to do so by a police officer under s. 70(1);

(c) without his consent as required under s. 70(3); and

(d) without a warning as required under s. 70(4),

and as a consequence, the specimen was inadmissible in evidence.

Counsel referred to the English case of *R. v. Bove* [1970] RTR 261, where the accused who had been unlawfully arrested under s. 2 of the Road Safety Act 1967 was acquitted on a charge of failing to provide a specimen of his blood without reasonable excuse under s. 3(3) on the ground that the requirements of s. 3(1) (one of which was he could not be under an obligation to provide the specimen unless he was lawfully arrested) have not been complied with. On p. 263 of the report, Lord Chief Justice Parker said:

> There is no doubt that in every decision of this Court, beginning with *Scott v. Baker* [1968] 52 Cr. App. R. 566; [1969] 1 QB 659 and ending with *Pinner v. Everett* (*supra*) in the House of Lords, it has always been assumed to be the law that a man could not be convicted of an offence under s. 1 unless a specimen of blood or urine had been obtained pursuant to s. 3. When one turns to s. 3, one finds before a specimen for a test can be required that there must have been an arrest under s. 2 of the Act or under s. 4 of the principal Act, and that there must have been an opportunity for a breath test at the police station. It has always been assumed in case after case that an invalid arrest will make the certificate inadmissible, and accordingly that will be a defence to a charge under s. 1 of the Act.

Counsel submitted that the type of illegality involved in *R. v. Bove*, being in the nature of direct contravention of a statute, is different from the type of illegally obtained evidence (i.e. by trickery or other improper means) that was held to be admissible under the ruling in *R. v. Kuruma* [1955] AC 197. He also referred to *R. v. Payne* [1963] 1 WLR 637 to show that the Courts in England have excluded evidence of unfitness to drive which was obtained unfairly from the accused.

It is not necessary for me to consider the English cases in any detail other than to note that they are decisions based on the construction of the rather unusual wordings of the relevant provisions of the English road traffic legislation (which have now been repealed or modified). A clear example of the approach is the statement of Lord Parker CJ in *Scott v. Baker* [1969] 1 QB 659 at p. 671 where he said:

> Section 1 `- now s. 6(1) of the Act of 1972 - `provides that it shall only be an offence if a person drives a motor vehicle having consumed alcohol which is later shown to exceed the prescribed limit on the provision of a specimen under s. 3' - now s. 9 -' ... it will be seen ... that there can ... be no provision of a specimen under s. 3 unless the person had been arrested under subsection(4) of s. 2' - now s. 8(4) - `which in turn can only be made after what I may call the first breath test; and also the specimen can only be provided if the person has been given an opportunity under subsection (7) of s. 2 to have a second breath test. It seems to me quite impossible to argue that a specimen was properly provided under s. 3, as it has to be before there is an offence, unless those matters have first been complied with.

The above statement was approved by the House of Lords in *Spicer v. Holt* [1976] RTR 389, where their Lordships decided:

> that ss. 5(5), 8 and 9 [of the Road Traffic Act 1972] laid down a code of procedure to be followed before a person could be convicted of an offence under s. 6(1) of the Act, and each step in the procedure must be taken before proceeding to the next step; that the arrest of the defendant was admittedly unlawful, and that it was therefore not an arrest under s. 8(5), as it purported to be; and that accordingly, no evidence of subsequent analysis of a specimen of blood or urine from the defendant was admissible.

In my view, the line of decisions culminating in *Spicer v. Holt* has no application to the present case, as s. 68 of the RTA, under which the appellant was convicted, makes no reference whatever to any procedural requirements whether in s. 70 or otherwise for taking a specimen and is not part of a code of procedure, each step of which has to be followed. An English decision which has more relevance to the present case is *R. v. Trump* [1980] RTR 274, where "... the appellant was arrested under s. 5(5) of the Road Traffic Act 1972, taken to a police station, where he was required to provide a specimen for a laboratory test and warned in accordance with s. 9(7) that failure to provide the specimen make him liable for imprisonment, a fine and disqualification. He provided a specimen of blood, which on analysis revealed a concentration of alcohol above the prescribed limit. He was tried on a charge of driving when unfit to drive, contrary to s. 5(1). The analysis was admitted in evidence and the appellant was convicted. He appealed against conviction on the ground that the analysis evidence should have been excluded since the laboratory test specimen had been unlawfully obtained, in that he had been constrained to provide it because of the warning in accordance with s. 9(7) so that it had not been taken from him with his consent within s. 7(1). The Crown conceded that the appellant's arrest was unlawful, and the appellant conceded that the constable was entitled to require a breath test by virtue of s. 8(2) and had a power of arrest under s. 8(4). Dismissing the appeal, the Court of Appeal held that, as the specimen of blood was obtained as a result of the warning given under s. 9(7) of the Act and, therefore, not with the appellant's consent within the meaning of s. 7(1) of the Act,

there was no obligation under s. 7(1) to admit the analysis evidence; but that the evidence provided by the appellant was analogous to an admission and, therefore, it was within the discretion of the Judge to admit it; and that, had the Judge excluded the analysis evidence, his discretion would have been exercised improperly.

On the issue of admissibility of improperly obtained evidence, the Court of Appeal referred to *R. v. Sang* [1979] 3 WLR 263 and said (at p. 276) that in that case the House of Lords held "that (1) a Judge in a criminal trial has a discretion to refuse to admit evidence if its prejudicial effect outweighs its probative value; (2) an involuntary confession or admission is inadmissible in evidence; and (3) there is room for further consideration of evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a Judge in excluding an actual confession which had the like self-incriminating effect, and also for consideration of the effect of a Judge's duty to ensure a fair trial. Apart from this there is no general exception to exclude evidence improperly obtained."

The Court of Appeal then concluded that a limited exception in cases to improperly obtained admissions was recognised by the House of Lords to exist in *R. v. Sang*, that the extent of the exception was not fully considered and that *R. v. Payne* [1963] 1 WLR 637 was still good law. As Counsel for the appellant has cited *R. v. Payne* in support of his argument, I will now have to consider its relevance to the present proceedings.

In *R. v. Payne*, the defendant who was charged with drunken driving, had been induced to submit himself to examination by a doctor to see if he was suffering from any illness or disability, upon the understanding that the doctor would not examine him for the purpose of seeing whether he were fit to drive. The doctor gave evidence of the defendant's unfitness to drive based upon his symptoms and behaviour in the course of that examination. He was convicted on such evidence. The Court of Criminal Appeal quashed his conviction on the ground that the trial Judge ought to have exercised his discretion to exclude the doctor's evidence. *R. v. Payne* was considered by the House of Lords in *R. v. Sang*. Lord Diplock, Lord Fraser of Tullybelton and Lord Scarman regarded the case in *R. v. Payne* as being "analogous to unfairly inducing a defendant to confess to an offence, and the short judgment of the Court of Criminal Appeal is clearly based upon the maxim *nemo debet prodere se ipsum*" (Lord Diplock at p. 271). I would respectfully adopt their Lordships' view of *R. v. Payne* as what the accused was induced to do could have amounted to an involuntary confession to the doctor that he was unfit to drive.

The legal position after *R. v. Sang* as explained by *R. v. Trump* as regards evidence analogous to self-incriminating admission is that its admissibility if subject to the discretion of the Judge. The same rule applies in Singapore and the actual decision of the Court of Criminal Appeal in *Cheng Swee Tiang v. PP* [1964] 30 MLJ 29 does not conflict with *R. v. Sang*. Accordingly, in the present case, the Magistrate was correct in refusing to exclude P6 in evidence.

I come now to the submission on lack of consent on the part of the appellant in giving a specimen of his blood to PW1. In *R. v. Trump*, the Court of Appeal held that the appellant had not given his consent because he gave it in response to a warning to him. But the Court of Appeal also held that "Giving the blood was very close to making an admission that the appellant had consumed an excessive amount of alcohol" thereby making it clear that what was done there did not amount to an involuntary admission. In the present case the lack of consent is of a different kind. Here, no warning was given to the appellant, but he did not appear to have objected to his blood being taken. Was there consent for the

purpose of s. 70? If not, did it amount to an involuntary admission of guilt? A perusal of the Appeal Record shows that in the proceedings below Counsel for the appellant based his submissions on inadmissibility wholly on the basis of contravention of s. 70 in that his client had not been arrested under s. 68 or 69 or given a warning. The issue of consent was never raised by Counsel for the appellant in cross-examination or in both his speeches at the end of the prosecution case and at the end of the defence case. If the issue had been raised then PW1 or even the appellant himself might have provided the evidence. Should he be allowed to raise it on appeal? A similar situation occurred in *R. v. Sadler/R. v. Palfrey* [1970] RTR 127, where the Court of Appeal refused to consider a submission of no consent on the ground that it was not raised in the Courts below in these words "It is entirely as an afterthought that it is said that it has not been established affirmatively that the blood specimen in either of the two cases was taken with the consent of the accused." This observation, in my view, applies to this ground of appeal. Accordingly, I do not find it necessary to consider whether or not the appellant gave his consent, and in that connection, whether "consent" in s. 70(3) means consent given expressly as distinguished from consent given impliedly, i.e. without compulsion by a failure to object to blood being taken. But, even assuming that no consent had been given, the appellant would still have to overcome the hurdle as to whether the evidence amounted to an involuntary confession or admission of a nature that renders the evidence inadmissible. In *Pakala Narayanasamy* [1939] 66 IA 66 Lord Atkin said that "A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence." Here, if there had been any confession or admission, it was merely to the fact that the appellant had an excessive amount of alcohol in his blood and not to the fact that he was made unable to control his scooter whilst under the influence of drink.

I now deal with the admissibility of P5 for the purpose of s. 70(3) of the RTA although the Grounds of Decision of the Magistrate do not advert to this issue. Section 70(3) provides that:

> For the purposes of any proceedings for an offence under ss. 68 or 69 subsection (2),a certificate purporting to be signed by a medical practitioner that he took a specimen of blood or urine from a person with his consent shall be evidence of the matters so certified and of the qualifications of the medical practitioner:

Provided that such certificate shall not be accepted as evidence for the prosecution unless a copy thereof had been served on the accused not less than 7 days before the hearing."

Section 70(3) raises an irrebuttable presumption in respect of the qualification of the medical practitioner and of the matters so certified i.e. the medical practitioner took his specimen with the consent of the person. P5 clearly does not comply with the requirements of s. 70(3) as it does not even certify that the blood was taken and with the consent of the appellant. P5 was certainly not evidence of any of the matters certified or mentioned therein unless in was a certificate admitted under and in accordance with s. 368 of the Criminal Procedure Code or PW1 has given evidence of such matters.

I turn to s. 71 of the RTA which creates the presumption of incapability of having proper control of a motor scooter. Neither P5 nor P6 was a certificate which fulfilled the requirements of s. 71 itself. Not only was the appellant not arrested or warned prior to his blood being taken, P5 did not comply with s. 70(3) and P6 was signed by the Chief Scientific Officer, who may or may not be a medical practitioner. Accordingly, I agree with Counsel for the appellant that the Magistrate was wrong in applying the presumption against the appellant.

Has the prosecution proved its case without the presumption in s. 71? The Magistrate decided in the affirmative. I agree with him. P6 was a document admissible under s. 368 of the Criminal Procedure Code as *prima facie* evidence of the facts stated therein i.e. that the appellant had in his blood 152 mg. of alcohol per ml. of blood. According to JK. Mason at p. 309 of *Forensic Medicine For Lawyers* (a textbook cited by the appellant's Counsel to prove the diffusion rate of alcohol in blood), the likely practical effect, on an average assessment, of a given blood concentration of alcohol, at 100-200 mg. per 100 ml. would be: "Distinct loss of skill, slurring of speech and commencing loss of co-ordination,"; that ``much depends on the conditions for drinking, the availability of food, etc. and that habituation to alcohol occurs - the reason for this not being entirely clear - that the same blood concentration will have a lesser effect on the regular drinker than on the novice." In my view, this evidence alone is sufficient for the defence to be called at the end of the prosecution's case. At the end of the case for the defence, there was no longer any doubt that the appellant was guilty as charged, as he admitted that he would get intoxicated very easily and that he fell from his scooter after riding it a short distance from his nephew's house.

Counsel for the appellant has also criticised the Magistrate for placing too much reliance on PW1's statement that the unsteady gait of the appellant 12 hours after the accident was due to the after effect of alcohol (when there could have been no alcohol in the appellant's blood) and not to hypertension or the injury to his head. As there is sufficient objective evidence to sustain the conviction of the appellant, with PW1's evidence on this point, I do not find it necessary to decide whether or not any weight should have been given to PW1's evidence. I disregard it for the purpose of this appeal.

Counsel for the appellant also argued that there was no evidence that the blood examined by the chemist was the blood taken by PW1 from the appellant. He submitted that the fact that the bottle or container was labelled "Ajmer Singh Ad. No. 2038228G" was insufficient to prove the chain of identification. He cited *R. v. Orrell* where it was held that it was sufficient for the prosecution to prove by written markings on the sample bottle of urine that the sample of urine taken from the defendant was that received by the laboratory and analysed by the analyst. In *Tremlett v. Fawcett* [1984] 1 RTLR 68, it was held there was no need for the prosecution to prove specifically that a sample of urine had been sent from the police to the laboratory for analysis. In that case the sample had been marked and placed in an envelope signed across the seal by the police officer with the envelope bearing the name of the defendant. The analyst had certified that he had received the specimen in a sealed container. In the present case, P6 itself refers to a sample of blood sealed General Hospital Singapore and marked "Ajmer Singh Ad. No. 2038228G". In my view, this is sufficient to prove the chain of identification and accordingly I reject Counsel's submission on this point.

As regards sentence, Counsel for the appellant has not made out a case that it was excessive.

In the result, the appeal against conviction and sentence is dismissed.

Also found at [1987] 1 CLJ 416